No. 06-674

IN THE

Supreme Court of the United States

DONALD BRADFISCH; VINCE KWIATKOWSKI; EDMUND WOODBURY; and JOSEPH PARISE, JR., as Trustee of THE ICON MECHANICAL CONSTRUCTION AND ENGINEERING 401K RETIREMENT SAVINGS PLAN,

Petitioners,

v.

TEMPLETON FUNDS, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

1. Respondent Templeton Global Advisors Limited is a wholly-owned subsidiary of Templeton Global Holdings Ltd., which is a wholly-owned subsidiary of Templeton International, Inc., which is a wholly-owned subsidiary of Templeton Worldwide, Inc., which is a wholly-owned subsidiary of Franklin Resources, Inc.

2. Respondent Templeton Investment Counsel, LLC is a wholly-owned subsidiary of Templeton Worldwide, Inc., which is a wholly-owned subsidiary of Franklin Resources, Inc.

3. There is no parent company or publicly-held company that owns 10% or more of Respondents Templeton Funds, Inc., Templeton Growth Fund, Inc. or Templeton Global Smaller Companies Fund.

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Statutes:

15 U.S.C. § 77p(c) ("SLUSA") ..... *passim*

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Rules:

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TWO PERCEIVED MISSTATEMENTS

Rule 15.2 of this Court provides, in pertinent part:

> Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition. Any objection to consideration of a question presented based on what occurred in the proceedings below, if the objection does not go to jurisdiction, may be deemed waived unless called to the Court's attention in the brief in opposition.

We respectfully submit that two such misstatements lie at the very heart of the Questions Presented in the petition in this case.

1. Petitioners frame the first question as follows:

> Whether the court of appeals erred in affirming the dismissals of petitioners' claims without affording them notice and an opportunity to present grounds for reversal.

This question contains a factual misstatement of what actually happened below: the court of appeals *did* provide notice and an opportunity to present grounds for reversal. Petitioners *chose*, for tactical reasons best known to themselves, not to present their views to the court of appeals on the critical question posed by the court of appeals, notwithstanding that Respondents did so.

Thus, by Order of March 23, 2006, the court of appeals directed counsel to file statements discussing the effect on these pending appeals of *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 126 S. Ct. 1503 (2006), decided by this Court two days earlier.

Respondents provided a full discussion and analysis of the effect of *Dabit*.[1] Petitioners, by contrast, evaded the question and chose only to suggest, in cursory fashion, that the court of appeals should continue in place a stay granted prior to the argument of *Dabit*.

The court of appeals then, by Order of May 19, 2006, held that these four appeals were governed by *Dabit* and affirmed the dismissals below.

Petitioners then sought, with three successive motions, to change the minds of the judges of the court of appeals. Petitioners sought rehearing — denied. Petitioners sought to vacate the Order denying rehearing — denied. Petitioners sought to recall the mandate — denied. In all three of these efforts Petitioners put forth their arguments against the dismissal of these four appeals, and they were rejected each time by the court of appeals. To argue, as Petitioners now do, that they did not have their day in court, or that they have been deprived of "due process" or "effective appellate review" by the court of appeals on these four appeals is preposterous. Petitioners resolved upon a strategy of evasion, and the court of appeals, fully advised by Respondents, ruled. Petitioners cannot now look to this Court to bail them out of their own misguided tactical choice.

2. Petitioners frame the second question as follows:

> Whether the court of appeals erred in holding that the 30-day time limit in 28 U.S.C. § 1446(b) for removing a civil case to federal court does not apply to removal under the Securities Litigation Uniform Standards Act of 1998, 15 U.S.C. § 77p(c), a statute that is silent on the time for removal.

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1. Petitioners chose not to include our Statement in their Appendix to the petition. Nor did they include their cursory response to the question posed by the court of appeals. We include copies of both as Addenda A and B to this brief in opposition.

This question misstates the holding of the court of appeals. In fact, the court of appeals did *not* hold that the 30-day time limit in § 1446(b) does not apply to removal under SLUSA. Rather, it held that (a) these cases were governed by *Dabit*, and that (b) Petitioners had failed to address the issue of removability under SLUSA in the court of appeals or in the district court.

Thus, in elaborating on its affirmance of the dismissal of these four appeals, in the Order of June 15, 2006 denying rehearing, the court of appeals wrote:

> Appellants maintain in their petition for rehearing that the panel failed to consider the possibility that the cases had been removed to district court after the time provided by 28 U.S.C. § 1446(b) had expired. We omitted this subject because appellants did not mention it in the memoranda filed at the court's direction concerning the appropriate disposition of the appeals in light of *Dabit*. Moreover, the district court did not rely on § 1446(b) when holding the removal proper; instead, the district court wrote, removal was authorized by 15 U.S.C. § 77p(c) whether or not it would have been timely under § 1446(b). The district judge added that, although defendants had relied expressly on § 77p(c), *plaintiffs "have not addressed the removability of the case under [this] SLUSA provision." That remains true: appellants' petition for rehearing discusses § 1446(b) to the exclusion of § 77p(c) and thus does not afford any basis for reconsideration.* (emphasis supplied)

Accordingly, the holding in the court of appeals was based in part on the failure by Petitioners, in the court of appeals and the district court, to address or challenge a critical aspect of the judgment of dismissal by the district court, i.e.

the SLUSA removal provision. Thus, the second question in the petition was not the basis of the holding by the court of appeals, was not ruled upon by the court of appeals and, accordingly, should not be considered by this Court.

REASONS FOR DENYING THE PETITION

None of the traditional reasons for granting *certiorari* is present in this case:

- the court of appeals did not enter a decision in conflict with the decision of another court of appeals on the same important matter;

- the court of appeals did not decide an important federal question in a way that conflicts with a decision by a state court of last resort;

- the court of appeals did not so far depart from the accepted and usual course of judicial proceedings, or sanction such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

- the court of appeals has not decided an important question of federal law that has not been, but should be settled by this Court;

- the court of appeals has not decided an important federal question in a way that conflicts with relevant decisions of this Court.

With respect to the specific arguments raised in the petition, they fall far short of reasons for granting *certiorari*, as set forth below.

I. Petitioners Were Not Denied "Due Process" Or "Effective Appellate Review"

There was no denial of "due process" or "effective appellate review" in this case because the court of appeals *did* give the Petitioners sufficient notice and opportunity to present their arguments, but Petitioners *chose* not to present them. Indeed, the court of appeals gave the parties 10 days to present their arguments. Respondents availed themselves of the opportunity; Petitioners failed to do so. Fed. R. App. P. 2 permits a court of appeals, on its own, to expedite its decision or otherwise order proceedings as it directs. Here the court of appeals, by Order of March 23, 2006, **directed** counsel to address the effect of *Dabit* on these appeals. That issue obviously involved a potentially controlling question of law. Even if, contrary to all common sense and logic, Petitioners initially misconstrued the Order of the court of appeals as merely calling for a commentary on the stay then in effect, they could not possibly have continued to misconstrue the Order once they saw Respondents' papers, which vigorously advocated dismissal on the basis of *Dabit*. Petitioners could easily have submitted further papers opposing dismissal. They obviously chose not to do so for their own tactical reasons. By choosing not to address the question substantively, Petitioners made a misguided tactical litigation choice. It is not the role of this Court, we respectfully submit, to act as a safety-net for remorseful litigants.

II. Petitioners' Failure To Address Removal Of These Actions Under SLUSA In The Courts Below Should Preclude Consideration Of The Issue By This Court

Petitioners seek to have this Court review and reconcile the SLUSA removal provision with the general removal statute. That issue was not raised by Petitioners, nor passed upon by the court of appeals and, therefore, should not be

considered by this Court. The court of appeals held that Petitioners had failed to address the issue of removability of these cases under SLUSA, and had also failed to address that issue in the district court.

The district court (Reagan, J.) stated:

> Plaintiffs — whose briefs focused on removal under 28 U.S.C. § 1446(b) — have not addressed the removability of the case under the above-cited SLUSA provision.

The district court went on to hold:

* * *

> . . . the Court finds removal proper under 15 U.S.C. § 77p(b).

The court of appeals, as noted *supra*, p.3, came to the same conclusion about Petitioners' failure to address the issue in that court, notwithstanding that it was critical to the district court's opinion and was explicitly dealt with in Respondents' *Dabit* memorandum to the court of appeals. *See* Addendum B, points at pp. 3-4.

Finally, even if the issue on which Petitioners now seek review had been the basis of the holding of the court of appeals (which it was not), there would be no conflict with the decision of any other court of appeals because no other court of appeals has ruled on the issue. None of the cases cited by Petitioners in the petition involved the time limit of the SLUSA removal provision. SLUSA is a unique statute, embodying a strong, remedial public policy to bar certain types of class action litigation, and its provisions cannot be

interpreted by analogy to any other statute, such as the Federally Supported Health Centers Assistance Act, FIRREA or the Westfall Act relied on by Petitioners.

There is no good reason for this Court to intervene in these four cases where the lower courts have dismissed the cases on the basis of Petitioners' failed or misguided litigation strategy.[2]

CONCLUSION

The petition for certiorari should be denied. No further proceedings are warranted.

Respectfully submitted,

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2. Petitioners urge that it is unfair for Respondents, who did not appeal remand, to be better off than others who did appeal remand. This turns the matter on its head: Respondents were in the court of appeals **not** by way of appeal by Respondents of a remand (which is impermissible), but by way of an appeal by Petitioners of a judgment of dismissal. Thus, unlike the other cases, there was no lack of appellate jurisdiction in these four cases.

APPENDIX

ADDENDUM A: PETITIONERS' *DABIT* STATEMENT

APPELLANTS' RESPONSE TO MARCH 23, 2006 ORDER

The current stay of proceedings in these appeals should continue despite the Supreme Court's recent decision in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, No. 04-1371) (U.S. Mar. 21, 2006). On Plaintiffs' motion, this Court stayed proceedings in these appeals last year because Plaintiffs had planned to file a petition for *certiorari* in which they would ask the Supreme Court to review the Panel's April 5, 2005 ruling. Plaintiffs requested in their motion that the stay continue in the event the Supreme Court granted their petition. The Supreme Court granted Plaintiffs' petition for *certiorari* in *Kircher* and has scheduled that case for oral argument on April 24, 2006. The issue on which the Court granted *certiorari* in *Kircher* is whether this Court had jurisdiction to consider the remand orders. Thus, a decision in *Kircher* could still render these appeals moot.

For the foregoing reasons, Plaintiffs request that the Court continue its stay of proceedings in these consolidated cases pending the Supreme Court's disposition of Plaintiffs' appeal in *Kircher*.

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ADDENDUM B: RESPONDENTS' *DABIT* STATEMENT

STATEMENT ON THE EFFECT OF *DABIT* ON THESE CASES

1. *Dabit*, we respectfully submit, disposes of the appeals in these four (identical) cases. In *Dabit*, the Supreme Court gave an unqualified endorsement to *Kircher II* decided by this Court. In rejecting the Opinion of the Second Circuit and endorsing the Opinion of the Seventh Circuit, Justice Stevens wrote (2006 WL 694137, at *2 (March 21, 2006)):

> The background, the text, and the purpose of SLUSA's pre-emption provision all support the broader interpretation adopted by the Seventh Circuit.

Later in the Opinion, Justice Stevens wrote (at *4):

> The magnitude of the federal interest in protecting the integrity and efficient operation of the market for nationally traded securities cannot be overstated.

And, towards the end of the Opinion, Justice Stevens wrote (at *8):

> The presumption that Congress envisioned a broad construction follows not only from ordinary principles of statutory construction but also from the particular concerns that culminated in SLUSA's enactment. A narrow reading of the statute would undercut the effectiveness of the 1995 Reform Act and thus run contrary to SLUSA's stated purpose, viz., "to prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives" of the 1995 Act. SLUSA

Addendum B

> § 2(5), 112 Stat. 3227. As the *Blue Chip Stamps* Court observed, class actions brought by holders pose a special risk of vexatious litigation. 421 U.S., at 739. It would be odd, to say the least, if SLUSA exempted that particularly troublesome subset of class actions from its pre-emptive sweep. See *Kircher*, 403 F.3d, at 484.

It is hard to imagine a stronger affirmation of the principles of *Kircher II* than the one provided by Justice Stevens writing for a unanimous Supreme Court in *Dabit*.

2. *Kircher II*, now endorsed by *Dabit*, held that Congress intended to bar state-law based class actions, in both State and Federal courts, if they involve "covered class actions" and meet certain other conditions set forth in SLUSA. *Kircher II* found that all such conditions were met in that case. The two District Judges here correctly found that all such conditions were met in these four cases (which have Complaints identical to those in *Kircher*) and that, accordingly, the claims herein are barred by SLUSA and had to be dismissed.

District Judge Murphy held:

> The cases were . . . properly removed under SLUSA's own removal provision. Unlike Section 1446, SLUSA imposes no time limits on removal. SLUSA's removal and preemption provisions are triggered when four conditions are met: (1) the underlying suit is a "covered class action," (2) the action is based on state or local law, (3) the action concerns a "covered security," and (4) the defendant misrepresented or omitted a material fact or employed a manipulative or deceptive device or contrivance "in connection with the purchase or sale"

> of that security. *Kircher*, 403 F.3d 481; *see also Disher v. Citigroup*, No. 04-3073, 2005 WL 1962942, at *4 (7th Cir. Aug. 17, 2005). A review of the allegations of the complaints in these three cases reveals that the four conditions are met. *Kircher* and *Disher* mandate that this Court dismiss all of Plaintiffs' state law claims as barred by SLUSA.

District Judge Reagan held:

> *Kircher* instructs that lawsuits based on allegations such as those in Plaintiffs' complaint herein satisfy those four conditions and fall within SLUSA's reach. Accordingly, this action could be removed under 15 U.S.C. § 77p(c). Furthermore, *Kircher* mandates that this Court dismiss all of Plaintiffs' state law claims as barred by SLUSA. See 15 U.S.C. § 77p(b) (quoted above); *Kircher*, 403 F.3d at 480, 484 (SLUSA effectively "blocks" litigation of such claims).

3. In view of the Supreme Court's support for the broadest possible interpretation of SLUSA to effect the will of Congress, it is beyond peradventure that the removal provision of SLUSA, utilized by Defendants here, which contains no explicit time limitation, should be honored by this Court.[1] The procedural

1. A State court would also be bound by *Dabit*. 18 Moore's Federal Practice, § 134.02[4][b], Matthew Bender 3d ed. ("All state courts owe obedience to the Supreme Court in manners of federal law . . ."). Thus, to remand these four cases to the District Court only to have them remand the cases to the State court is to do a totally futile act, since the State court would be bound to dismiss them itself, under *Dabit* and its endorsement of *Kircher II*. See:

(Cont'd)

argument raised below by Plaintiffs, i.e. "late removal" under the general removal provision, 28 U.S.C. 1446, is beside the point and cannot undermine the powerful policy of SLUSA to bar this kind of litigation.

4. It follows from the above that the Orders of Dismissal appealed from in these four cases should be affirmed in all respects.

Dated: April 4, 2006

(Cont'd)

Asarco, Inc. v. Glenara, Ltd., 912 F.2d 784, 787 (5th Cir. 1990), where the Fifth Circuit Court of Appeals affirmed a district court's decision to dismiss, rather than remand an action (which allegedly had been improperly removed), since to remand would have led to wasteful proceedings in the State court, explaining:

> Plaintiffs contend that the state action should have been remanded because defendants cited erroneous grounds for removal in their removal petition. We need not decide that issue. Were the state action remanded, the Louisiana courts would be bound by our ruling that defendants had insufficient contacts with Louisiana to satisfy the federal due process clause requisites for personal jurisdiction. A remand thus would be a futile gesture, wasteful of scarce judicial resources, an exercise in which we decline to engage." (emphasis supplied)

Accord: *Haggert v. Hamlin*, 25 F.3d 1037 (Table), 1994 WL 251067 at *1 (1st Cir. 1994) (despite the defendants' failure to comply with § 1446(b), dismissal was proper because "remand would be unquestionably futile" as the state court would have to grant summary judgment to defendant).

Addendum B

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SUPPLEMENTAL BRIEF

(3)

No. 06-674

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IN THE

Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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This Supplemental Brief is necessitated to correct two serious misstatements in Petitioners' Reply Brief.

Petitioners state, in the opening sentence of their Reply Brief:

> Respondents do not dispute that a GVR [i.e. Grant, Vacate, Remand] is an appropriate disposition of this case.

Of course we dispute that and we said so in our Brief in Opposition (p.7):

> The petition for certiorari should be *denied* [i.e. not granted]. *No further proceedings are warranted* [i.e. no remand]. (emphasis supplied)

Petitioners then make a second misstatement of Respondents' position in the second sentence of their Reply Brief by stating, erroneously:

> Respondents also do not contest that the Court should order full briefing on remand . . ."

Since Respondents do not believe remand is appropriate, as we made clear in the Brief in Opposition, there was no need for us to even discuss "full briefing on remand".

CONCLUSION

The Petition for Certiorari should be denied. There should be no remand.

Dated: January 18, 2006

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